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IN THE  
**Supreme Court of the  
United States**

**DEPARTMENT OF CONSERVATION OF THE  
STATE OF LOUISIANA AND THE PUBLIC  
SERVICE COMMISSION OF THE STATE  
OF LOUISIANA**

*Petitioners,*

*versus*

**FEDERAL POWER COMMISSION,**

*Respondent.*

**Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.**

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OCTOBER TERM, 1944  
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DEPARTMENT OF CONSERVATION OF THE  
STATE OF LOUISIANA AND THE PUBLIC  
SERVICE COMMISSION OF THE STATE  
OF LOUISIANA

*Petitioners,*

*versus*

FEDERAL POWER COMMISSION,

*Respondent.*

\_\_\_\_\_  
Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.  
\_\_\_\_\_

The Department of Conservation of the State of Louisiana and the Public Service Commission of the State of Louisiana pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on March 31, 1945, rehearing denied April 18, 1945, which affirmed an order of the Federal Power Commission rendered November 21, 1944, granting certi-

ificates of public convenience and necessity to the Memphis Natural Gas Company authorizing the construction of pipe lines from Lisbon, Louisiana to Guthrie, Louisiana and from Guthrie, Louisiana to Memphis, Tennessee to be used for the transmission of natural gas. On June 10, 1944, the Federal Power Commission denied the certificate of public convenience and necessity to construct the line from Guthrie, Louisiana to Memphis, Tennessee, stating in its opinion that:

"In view of the limited natural gas reserves shown by the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses.

"The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future public convenience and necessity. Dismissal of the instant application, without prejudice, is appropriate in the public interest."

(Vol. I, pg. 62)

On rehearing the certificate was granted. (Vol. I, pg. 63)

## **OPINIONS BELOW**

The opinion of the Circuit Court of Appeals is not yet officially reported, but appears in the record in Volume 111, at pages 2-9. The opinions of the Federal Power Commission are found at Vol. I, 55-62, 63-79.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on March 31, 1945. An application for rehearing was denied on April 18, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 19 (b) of the Natural Gas Act.

## **STATUTE INVOLVED**

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821; 15 U.S.C. Secs. 717, 717f and 717r) are set forth in Appendix A.

## **QUESTIONS PRESENTED**

The Federal Power Commission on June 10, 1944, after a full hearing, denied the application of the Memphis Natural Gas Company for a certificate of public convenience and necessity to construct additional natural gas pipe lines from the Monroe, Louisiana, gas field to Memphis, Tennessee, a coal producing state. (Vol. 1, 55-62)

In denying the application, the Commission considered the limited natural gas reserves shown avail-

able to the applicant, and stated that because of the limited reserves, the rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of the gas, it was necessary and appropriate in the public interest that such natural gas resources be conserved insofar as possible for domestic, commercial and superior industrial uses. The Commission thus took into account in denying the application the use to which the gas would be put by the ultimate consumer, and held the natural gas should be conserved insofar as possible for domestic, commercial and superior industrial uses. (Vol. 1, 62)

The Commission granted a rehearing, and on rehearing the case was consolidated with the application of the same company to build a natural gas pipe line from the Lisbon, Louisiana, gas field to Guthrie, Louisiana, in the Monroe, Louisiana, gas field.

The record on rehearing showed the applicant's facilities ample to properly serve its domestic and commercial customers (Vol 1, 290-A); that the additional natural gas that would be made available if the proposed facilities are constructed would be burned under boilers; the entire record shows that the burning of natural gas under boilers is an inferior use of natural gas; that the City of Memphis, Tennessee, is in a coal producing area and has an ample coal supply. On rehearing the Applicant showed no additional gas reserves available to it under firm contracts, yet the Com-



mission reversed the opinion it rendered on June 10, 1944, and granted the applicant certificates of public convenience and necessity in both cases.

The questions presented are:

1.

Whether or not "public convenience and necessity" as used in the Natural Gas Act, is to be determined by the Federal Power Commission solely, only, and exclusively by consumer demand in the immediate locality where the natural gas would be sold, regardless of the purpose for which the gas will be sold, and regardless of how the gas would be used.

2.

Whether or not the Federal Power Commission is required to consider in connection with the issuance of public convenience and necessity, under the Natural Gas Act, the uses to which the gas would be put if the facilities are constructed.

3.

Whether or not the Federal Power Commission is required, under the Natural Gas Act, to consider matters of conservation, including natural gas reserves and the use to which the gas will be put, in determining, under the Natural Gas Act, that the public convenience and necessity requires the issuance of certificates to construct additional interstate natural gas.

## 4.

Whether or not public convenience and necessity, under the provisions of the Natural Gas Act, require or permit the issuance of certificates of public convenience and necessity to construct additional pipe lines to transport additional gas to a community already served with natural gas where present facilities are more than ample to transport sufficient natural gas for domestic consumption and commercial users, and all additional gas that would be transported through the new facilities would be consumed and burned under boilers; which the record shows is a grossly inferior use, where that same community is adequately supplied with coal and is located in a coal producing area.

## 5.

Whether it is in the public interest or is in derogation of the public interest, as these terms are used in the Natural Gas Act, for the Federal Power Commission to grant certificates of public convenience and necessity to construct additional pipe lines to transport additional gas to areas where present existing facilities are ample to serve domestic and commercial needs of the area, and where the additional natural gas will be put to an inferior use, that is, burned under boilers, where there is an adequate supply of other fuel, namely, coal.

## 6.

Whether or not the public interest referred to in the Natural Gas Act should be construed as the general public interest and the national public interest or should receive a narrow construction so as to mean the local consumer interest, regardless of the use to which gas is put and for what purposes it is consumed.

## 7.

Whether or not, under the Natural Gas Act, the Federal Power Commission and the lower court were required to view the matter from the broad public interest, including the investor interest, the consumer interest, and the more important phase of the public interest, which requires stopping unjust impoverishment of future generations, and whether or not the Federal Power Commission and the lower court, in failing to so view the matter, committed reversible error.

## 8.

Whether or not the Federal Power Commission and the lower court committed error in not holding that the issuance of the certificates of public convenience and necessity was in direct conflict and in derogation of the plain intent of Congress in adopting the Natural Gas Act for the reason that the purpose and intent of the Natural Gas Act adopted by Congress was to limit the use of the remaining resources of this highly valuable, irreplaceable, rapidly exhausting re-

source in a manner to best serve the general public interest, and for the Federal Power Commission to permit by the issuance of certificates of convenience and necessity, the transportation of additional gas to areas where coal is produced and is readily available as fuel, and there dissipate and burn natural gas under boilers, which constitutes a recognized inferior use, was erroneous, and contrary to the provisions of the Natural Gas Act.

## 9.

Section I of the original Natural Gas Act (Act of June 21, 1938) stated that the report of the Federal Trade Commission made at the (70th Congress first session) showed that the transporting and selling of natural gas for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and sale thereof in interstate and foreign commerce is necessary in the public interest; that in summarizing its voluminous report, the Federal Trade Commission in Part 84-A of Document 92, 70th Congress, First Session, which was transmitted to the Senate under date of December 31, 1935, said:

"... That the subject of natural-gas conservation is one which the Federal Government must approach with caution is understandable to anyone at all familiar with the jurisdictional problems involved. On the other

hand, anyone equally familiar with the economic importance of the commodity itself as a truly national resource, and the shocking and irreparable waste that has attended its exploitation in private hands, can hardly condemn an anxious national concern as to conditions that exist, or deny the national importance of their correction."

(Part 84-A, Page 600)

"... Conservation is the first problem that demands attention. Vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses."

"... Such a valuable nonreplaceable natural resource of general countrywide use or need should, in the public interest, be conserved and utilized to the highest economic and social advantage."

(Part 84-A, Page 606)

"... Natural gas must be used practically as soon as produced. Therefore, the public concern is that it be produced only as needed, and then that it be used to the highest economic and social advantage. There are no precise parallels in the utility fields for such a situation."

(Part 84-A, Page 613)

Whether or not the declaration of Congress in Section I and the reference to the said Federal Trade Commission report constitutes a criterion in the matter

of issuing certificates of public convenience and necessity, under the provisions of the Natural Gas Act, and whether or not the language of the report of the said Federal Trade Commission, which clearly sets forth the remedy of the evils sought to be eliminated by the Act of Congress, must be considered in construing what constitutes public convenience and necessity under the provisions of the Natural Gas Act.

## 10.

Whether or not there is substantial evidence in the record to support the finding of the Federal Power Commission on rehearing that the applicant has ample natural gas reserves available to justify the issuance of certificates of public convenience and necessity.

## 11.

Whether or not a letter agreement which is not final and which requires further negotiations with third parties constitutes a firm contract for additional natural gas so as to meet the requirements of the Natural Gas Act and whether such tentative letter agreement constitutes sufficient and substantial evidence to warrant the finding that applicant, Memphis Natural Gas Company, has shown its ability to perform its obligations.

## 12.

Whether or not a finding by the Federal Power Commission, under the Natural Gas Act, after purportedly considering all facts, that the public con-

venience and necessity require the building of a pipe line, is a finding of fact that is conclusive.

## 13.

Whether or not public convenience and necessity, under the Natural Gas Act, require or permit the issuance of certificates, under Section 7 of the Act, to build additional natural gas pipe lines to transport natural gas to coal producing areas to be burned under boilers, when approximately ninety-eight percent of the nation's fuel supply is coal and approximately one-tenth of one percent of the nation's fuel supply is natural gas.

## 14.

Whether or not the issuance of certificates of public convenience and necessity, in such cases, is not in direct contravention of sound conservation practices, and whether or not, the issuance of certificates of convenience and necessity in such cases, does not, in fact, encourage the use of natural gas, an irreplaceable natural resource, as boiler fuel in territories far distant from the natural gas fields, and in territories where there is a bountiful supply of coal, and whether or not, the issuance of certificates in such cases constitutes a gross abuse of discretion by the Federal Power Commission, and whether or not such action is in direct contravention with, and in derogation of, the provisions of the Natural Gas Act.

## 15.

Whether or not, under the provisions of the Natural Gas Act, public convenience and necessity, and the public interest, require or permit the issuance of certificates under Section 7 of the Act to construct additional pipe line facilities to transport additional natural gas to Memphis, when the record shows that approximately eighty-eight percent of all the natural gas sold in the City of Memphis for industrial purposes is burned under boilers, and approximately seventy-six percent of the volume sold for commercial purposes is used for boiler fuel, which constitutes an inferior and uneconomical use of natural gas, especially, where other fuels are readily available. Whether or not, the record contained substantial evidence under these conditions to justify or permit the finding by the Commission that the general public interest and the general public convenience and necessity require or permit the issuance of certificates of convenience and necessity.

## 16.

Whether or not the order of the Federal Power Commission of November 21, 1944, issued in this case, is erroneous and should be reversed for the reason that the record does not disclose substantial evidence to support the conclusion that the general public convenience and necessity require the granting of said certificates because if the proposed facilities are not constructed, curtailments will have to be made only in service to con-



sumers using gas for boiler fuel purposes, which is an inferior purpose, and, whether or not, the use of natural gas for such purposes in areas far distant from natural gas fields and where an ample supply of coal is produced is not in contravention of sound conservation practices, and to permit the use of natural gas for such purposes and encourage same by the issuance of certificates to build additional facilities, constitutes an abuse of discretion on the part of the Federal Power Commission, and whether or not, the order granting the certificates is in derogation of the general public interest within the meaning of the Natural Gas Act.

## 17.

Whether or not it was the purpose and intent of Congress, by adopting the Natural Gas Act, to conserve the limited remaining supply of the irreplaceable natural resource, namely, natural gas, for superior uses, and to limit the use of natural gas to the highest economic and social advantages.

## 18.

Whether or not it was the intent and purpose of Congress, in adopting the Natural Gas Act, to stop the drainage of natural gas resevoirs that are being subjected to profligate and wanton waste and uneconomical uses, especially in view of the reference by Congress in Section 1 of the Act to the report of the Federal Trade Commission.

## 19.

Whether or not Congress intended, by the passage of the Natural Gas Act to recognize the importance of natural gas as a national resource, and to stop the shocking and irreparable waste that has attended its exploitation in private hands, such as building additional pipe lines to transport natural gas to areas far distant from gas fields, and there burn it under boilers where there is an ample supply of coal produced in the area.

## 20.

Whether or not Congress, in adopting the Natural Gas Act, intended that, as stated by the Commission in the original opinion in this case, natural gas resources should be conserved insofar as possible for domestic, commercial and superior industrial uses; and whether or not, the granting of certificates under Section 7 of the Act to build pipe line facilities to transport natural gas to far distant points and there to be burned under boilers in an area where there is an ample supply of coal and in an area where coal is produced, is in derogation of the purposes and requirements of the Natural Gas Act and constitutes an abuse of discretion on the part of the Federal Power Commission in granting such certificates.

## 21.

The certificate of public convenience and necessity involved herein permits the Memphis Natural Gas Company to construct a twenty inch line from Lisbon,

Louisiana, to Guthrie, Louisiana, a distance of approximately forty-nine and one-half miles. The record shows that one-half the capacity of this line will be used to transport gas for the account of the United Gas Pipe Line Company which increases the facilities of the United Gas Pipe Line Company to that extent without the United Gas Pipe Line Company having filed an application for a certificate under Section 7 of the Act. Whether or not the action of the Federal Power Commission in granting a certificate which increases the facilities of United Gas Pipe Line Company without that company obtaining a certificate of public convenience and necessity, is null and void and contrary to the provisions of the Natural Gas Act.

## 22.

Whether or not, in construing the provisions of the Natural Gas Act and determining the authority and duty of the Federal Power Commission in granting certificates under Section 7 of the Act, the Federal Power Commission and the court were required to consider the evil sought to be remedied by Congress in adopting the Natural Gas Act, and whether or not, a failure to do so by the Commission and the Court, constitutes reversible error.

## 23.

Whether or not the Commission and the Court were required, under the provisions of the Natural Gas Act, to take into account and consider the uses to

which the natural gas would be put in determining what constituted public convenience and necessity, and, whether or not, when the record shows that all the additional natural gas would be burned under boilers, which the record conclusively shows is an inferior and wasteful use, the Commission and the Court must conclude that public convenience and necessity do not require the construction of the additional natural gas pipe line facilities.

## 24.

Whether or not the lower court erred in failing to hold that the Natural Gas Act was passed by Congress in recognition of the necessity of establishing federal legislation over the transmission and sale of natural gas in interstate commerce so that the use of the remaining resources of this highly valuable, irreplaceable, rapidly exhausting natural resource, might be controlled to the extent that the Federal Government might properly exercise such control in a manner to best serve the general public and national interest, rather than the interest of an immediate consuming locality.

## 25.

Whether or not the lower court erred in failing to hold, under the provisions of the Natural Gas Act, the Federal Power Commission is required to take into consideration matters of natural gas reserves, conservation, end uses, inferior and superior uses of natural gas, in certificate cases, in order to determine public

convenience and necessity, and when the record shows that ample gas is available under existing facilities for domestic and commercial uses, and the additional natural gas claimed needed would be burned under boilers, which constitutes an inferior use and wanton waste of natural gas, in areas where an ample supply of coal is available, the Federal Power Commission is required to find and conclude that public convenience and necessity does not require the building of the additional facilities.

## 26.

Whether or not there is substantial evidence in the record to support the final and ultimate conclusion of the Federal Power Commission, based on all the facts in the record, that public convenience and necessity require or permit the building of the natural gas pipe lines involved herein.

## 27.

Whether or not the lower court erred in the following statement in the opinion rendered on March 31, 1935, in the case at bar:

" . . . Assuming without deciding that the Commission could properly consider as one of the facts entering into the granting or denial of the certificates the uses to which the gas was to be put, that is, that considerations of conservation had a place in such granting or refusal, we think it quite plain that the statute does not make such matters determinative. . . "

Whether or not the court erred in making the following statement, in its opinion rendered in this case on March 13, 1945:

“ . . . They (Petitioners) insist that all that they are doing is to present evidence that the use to which the gas will be put under the certificates is a most inferior one, and that this being undisputed, the Commission, as a matter of law, could not grant the certificates and we must set them aside. We have looked in vain for a criterion for such action on our part. Petitioners do not point us to, we have found no, guiding language in the Act, or in any decision construing it, which supports this view or, indeed, points in this direction. . . ”

Whether or not the court erred in disregarding the language of this Court in the case of Hope Natural Gas Company vs. Federal Power Commission, 320 U.S. 591, 64 Sup. Ct. 281, and whether or not the court erred in completely disregarding the purpose of Congress in adopting the Natural Gas Act as set out in Section 1 of the Natural Gas Act.

## STATEMENT

The Department of Conservation of the State of Louisiana and the Public Service Commission of the State of Louisiana ("Petitioners") seek a review, under Section 19 (b) of the Natural Gas Act (52 Stat. 821; 15 U.S.C., Sections 717-717r), of the Federal Power Commission's order of November 21, 1944, issuing certificates of public convenience and necessity under Section 7 (e) of the Act to the Memphis Natural Gas Company, authorizing the construction and operation of specified facilities for the interstate transportation and sale of natural gas, subject to the commission's jurisdiction.

The Memphis Natural Gas Company ("Applicant"), a Delaware corporation having its principal place of business in Memphis, Tennessee, owns and operates an 18 inch natural gas pipe line which extends from the Monroe gas field in Louisiana, through Arkansas and Mississippi, to the City of Memphis, Tennessee. The natural gas transported through this pipe line is purchased by the Applicant from the Southwest Gas Producing Company, Inc., and United Gas Pipeline Company at Applicant's Guthrie compressor station in Ouachita Parish, Louisiana, and such gas is sold by the Applicant to one direct sale and five wholesale customers, the principal one of the latter being the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee.

On January 31, 1944, the Applicant filed an application with the Federal Power Commission (in F.P.C Docket No. G-522) for a certificate of public convenience and necessity under Section 7 (e) of the Natural Gas Act to authorize the construction and operation of three 18 inch pipe lines, aggregating some 61½ miles in length, to parallel the unlooped portions of its existing pipe line. (Vol. 1, 56)

A public hearing with respect to this application was held before the Commission's Trial Examiner between March 15 and April 17, 1944. (Vol. 1, 56)

Pursuant to leave granted by the Commission, the State of Tennessee, the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee, and the West Tennessee Gas Company of Jackson, Tennessee, intervened in support of the application, while the Public Service Commission of Louisiana, the Department of Conservation of the State of Louisiana, the National Coal Association, the United Mine Workers of America, the Order of Railway Conductors, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, intervened in opposition to the application. (Vol. 1, 55-56)

Upon consideration of the record thus made, the Commission, by order of June 10, 1944, found that "In view of the limited natural gas reserves shown by



the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, **it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses**" and that "The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future public convenience and necessity." (Vol. 1, 62)

The application for a certificate to authorize the construction and operation of the proposed facilities to complete the looping of Applicant's main pipe line was accordingly dismissed without prejudice. (Vol 1, 62)

The Applicant on July 10, 1944, filed an application for rehearing under Section 19 (a) of the Act which the Commission granted by order of August 1, 1944. (Vol. 1, 63)

In the meantime, on May 29, 1944, the Applicant had filed (in F.P.C. Docket No. G-549) another application for a certificate of public convenience and necessity to authorize its construction and operation of a 20-inch natural gas pipe line, approximately 49½ miles in length, extending from the Lisbon gas field in Claiborne Parish, Louisiana, to Applicant's Guthrie com-

pressor station in the Monroe field. (Vol. 1, 63) Upon Applicant's request the Commission consolidated the hearing on the second application with the rehearing on the first application. (Vol. 1, 63)

Public hearings in the consolidated proceedings were held before the Commission's Trial Examiner between September 7 and October 5, 1944. (Vol. 1, 63) In addition to the above named intervenors, who had participated in the previous hearing, leave to intervene was also granted to the State of Mississippi, the Oil and Gas Board of the State of Mississippi, the Railroad Commission of the State of Texas, the Corporation Commission of the State of Kansas, the Department of Public Utilities of the State of Arkansas, and the Independent Natural Gas Association of America.

Following the close of these hearings, oral argument was had before the Commission on October 16, 1944. (Vol. 1, 63)

By the order of November 21, 1944, here under review, and the accompanying Opinion No. 119, the Commission found that the construction and operation of the proposed facilities "are and will be required by the present and future public convenience and necessity" and that the Applicant "is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules and

regulations of the Commission thereunder". (Vol. 1, 79) The Applicant was accordingly issued certificates of public convenience and necessity authorizing its construction and operation.

Petitioners filed an application for a rehearing on December 9, 1944, with the Federal Power Commission. (Vol. 1, 85). Petitioners' application for a rehearing was denied by the Commission on December 12, 1944. (Vol. 1, 93). Thereafter on December 22, 1944, petitioners filed, in the United States Circuit Court of Appeals for the Fifth Circuit, their petition for review of the Commission's order of November 21, 1944, under Section 19 (b) of the Natural Gas Act.

At the original hearing on the application to build the pipe lines from Guthrie, Louisiana, to Memphis, Tennessee, a full and complete record was made up, and based on this record, the Federal Power Commission emphatically held that, in view of the limited natural gas reserves shown to be available to Applicant and the present rapid rate of depletion and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, it was necessary and appropriate, in the public interest, that such natural gas resources be conserved insofar as possible for domestic, commercial and superior industrial uses. The Commission specifically stated in its opinion that the record did not contain sufficient showing that the proposed

construction and operation were or would be required by the present or future public convenience or necessity. The application to build the lines was denied.

Notwithstanding this rejection of the application to build the lines from Guthrie, Louisiana, to Memphis, Tennessee, by its order of June 10, 1944, on rehearing, the Commission completely reversed its former opinion and issued certificates of public convenience and necessity, only five months after the original opinion was rendered on June 10, 1944. The order issued November 21, 1944, reversing the previous opinion of the Commission, was conditioned upon Applicant beginning the construction of the pipe lines involved by December 15, 1944, only twenty-four days after the order of the Commission reversing the previous order, which rejected the application to construct the lines from Guthrie, Louisiana to Memphis, Tennessee.

Petitioners herein applied to the United States Circuit Court of Appeals for the Fifth Circuit for a stay order under the provisions of Section 19 (b) of the Natural Gas Act, which was granted by three judges.

### **THE STATUTE**

The Natural Gas Act, (the "Act"), effective June 21, 1938, in Section 1, declared that, as disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83, (Seventieth Congress, First Session), and other reports made pursuant to the

authority of Congress, the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

It is evident from this declaration of Congress, made in Section 1 of the Act, that the very purpose and intent Congress had in adopting the Natural Gas Act was to eliminate, insofar as possible, the evils set forth and deplored in the reports of the Federal Trade Commission and other reports made pursuant to the authority of Congress referred to in Section 1 of the Act.

By Act of February 7, 1942, Congress amended Section 7 of the Natural Gas Act so as to make it unlawful for any company or person to construct facilities for transporting natural gas in interstate commerce without first obtaining a certificate of public convenience and necessity authorizing such construction, said certificates to be issued by the Federal Power Commission.

Section 7 of the Natural Gas Act, as amended, provides that a certificate shall be issued to any qualified applicant if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed, upon showing that the proposed service, sale, operation, construction, extension, or acqui-

sition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise, such application shall be denied.

### **OPINION BELOW**

The opinion rendered by the United States Circuit Court of Appeals, Fifth Circuit, on March 31, 1945, in the case at bar, affirmed Opinion 119 and the order issued in connection therewith, by the Federal Power Commission on November 21, 1944. (Vol. III, 2-9).

The opinion of the Court, in affirming the opinion of the Federal Power Commission, held that the Applicant had showed adequate natural gas reserves. (Vol. III, 3). We submit the Court erred in this finding for the reason that, in our view, the Applicant, in submitting only letter agreements which were not final, as will be shown elsewhere in this petition and brief, failed to show adequate natural gas reserves available to Applicant to justify or even permit the issuance of the certificates of public convenience and necessity herein.

The lower court, on Page 5 of the opinion, held that, "The Commission has also found that the proposed extension is, or will be, required by the present or future public convenience or necessity, and viewing the matter entirely from the standpoint of consumer demand for the gas, the evidence is of such conclusive

character that it demands the finding that was made." We submit, that the lower court erred, in basing the issuance of certificate of public convenience and necessity entirely and solely on consumer demand, regardless of the use to which the gas will be put at its destination. The Commission and the lower court basing the issuance of certificates entirely on consumer demand, completely disregards and ignores the general public interest and the declaration of Congress in Section 1 of the Natural Gas Act, and completely disregards the meaning of "public convenience and necessity" as used in the Act.

The lower court, we submit, erred in holding, on Page 9 of its opinion, as follows:

"... They (petitioners) insist that all that they are doing is to present evidence that the use to which the gas will be put under the certificates is a most inferior one, and that this being undisputed, the commission, as matter of law, could not grant the certificates and we must set them aside. We have looked in vain for a criterion for such action on our part. Petitioners do not point us to, we have found no, guiding language in the Act, or in any decision construing it, which supports this view or, indeed, points in this direction..."

We submit, the lower court erred in the above finding for the reason that the Commission and the

Court failed to construe the meaning of "public convenience and necessity", as used in Section 7 of the Natural Gas Act, in the light of the plain and specific declaration of Congress in Section 1 of the Natural Gas Act in making reference to the report of the Federal Trade Commission, a part of which report is quoted in Paragraph 9 of "Questions Presented" in this petition and brief.

The Court made the following statement in its opinion with reference to the position of petitioners in the case at bar, and the issues squarely presented to the Court for decision.

" . . . Petitioners' reliance, however, is not on the ordinary considerations which control where the dispute is between rival companies, as it was in *Arkansas-Louisiana Gas Co. v. Federal Power Commission*, 113 F. (2) 281, or over rates or the limits of federal and state power, as it was in cases cited in Note 5, above. They base their whole case on reading the words 'public conveyance and necessity' as including considerations of conservation of natural gas with a consequent prohibition against the issuing of certificates where, as here, there is protest and proof by a state that the gas to be withdrawn under the authority of the certificates will be put to an economically wasteful use, that is to the inferior one of being



burned under boilers. Pointing to the evidence of the already highly developed industrial use of the gas, and the evident purpose to extend and increase that use, petitioners insist that this sustains its burden of showing that the finding of fact by the commission that the issuance of the certificates will be required by the present or future public convenience and necessity, is not supported by substantial evidence. . . ." (Vol. III, 6).

Petitioners also submitted evidence to conclusively show the limited known reserves of natural gas in Louisiana, (Vol. 1, 292-A—299-A, 67-A—85-A) and seriously urged that the remaining reserves should be conserved for superior uses, and to grant certificates of public convenience and necessity to construct additional pipe lines to transport additional natural gas to areas where coal is produced and where there is an adequate supply of coal, and there convert the coal burners to natural gas burners, simply because natural gas is cheaper, constitutes an abuse of the discretion placed in the Federal Power Commission by Congress under the Natural Gas Act, and is in complete derogation of and contrary to the very purpose and intent of the Natural Gas Act.

In the quotation from the opinion of the Court, above, it will be noted the Court recognized the fact that in this case there is protest and proof by the State

that the gas to be withdrawn under the authority of certificates in question, will be put to an economically wasteful use, that is, to the inferior one of being burned under boilers. To issue certificates under such circumstances is, we submit, contrary to the public interest, and is contrary to the intent and purpose of the Natural Gas Act, and by issuing certificates under such circumstances, the Federal Power Commission has abused its discretion.

### **REASONS FOR GRANTING WRIT**

#### **1.**

This case is one of great public significance and the final judgment will have a tremendously important bearing on the future conservation of one of the nation's most important and irreplaceable natural resources, natural gas.

#### **2.**

The issues in this case are squarely presented to the Court for the first time for judicial determination.

#### **3.**

The United States Circuit Court of Appeals, Fifth Circuit, in this case decided an important question of federal law which has not been, but should be, settled by this court.

#### **4.**

While the case of Federal Power Commission v. Hope Natural Gas Company, 320 U. S. 591, 64 Sup. Ct. 281, involved the validity of a rate fixed by the Federal

Power Commission under the Natural Gas Act, the Court in the majority opinion and in the dissenting opinions made statements entirely relevant and pertinent to the construction of the Natural Gas Act in certificate cases under Sec. 7; that Opinion 119 of the Federal Power Commission involved herein and the order issued in connection therewith, and the opinion of the lower court are in conflict with the pronouncements of the court in the Hope case.

## 5.

Since the adoption of the 1942 amendment to the Natural Gas Act by Congress, the Federal Power Commission has been uncertain as to its duties and authority under Section 7 of the Act which authorizes the Commission to issue certificates of public convenience and necessity. The position of the Commission as to what it is required to consider in granting certificates under Section 7 has been inconsistent. Prior to the decision of this Court in the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 64 Sup. Ct. 281, rendered January 3, 1944, the Federal Power Commission took the position that it had no authority to consider the use to which natural gas would be used at its destination in determining whether or not certificates of public convenience and necessity should issue.

After the Hope decision rendered by this Court, the Commission took the position it did have authority

and in fact is required to consider end uses and conservation in determining public convenience and necessity under Section 7 of the Act, and in fact stated in one of its opinions "That considerations of conservation are material to the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act is not open to question. We are deeply cognizant of the necessity for conservation of the country's irreplaceable natural gas resources." (Opinion 114 issued by the Federal Power Commission on April 26, 1944.)

The Commission considered end uses and conservation in refusing the Applicant a permit to build the lines from Guthrie, Louisiana, to Memphis, Tennessee, in the case at bar, and so stated in its opinion. (Vol. 1, 62) It reversed this opinion on November 21, 1944, and granted certificates of convenience and necessity, and in its brief filed in the United States Circuit Court of Appeals, Fifth Circuit, in the case at bar, the Commission stated the Natural Gas Act did not give it authority to consider end uses in the granting of certificates of convenience and necessity, and cited as authority its opinion in the case of Tennessee Gas and Transmission Company, 3 F.P.C. 574, which opinion was rendered September 24, 1943, prior to the decision of this Court in the Hope case, *supra*. (Brief filed by Federal Power Commission in United States Circuit Court of Appeals, Page 17.)

In the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 612, 64 Sup. Ct. 281, 292, the Court, in the majority opinion, said:

“ . . . When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions contained in Sec. 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. . . .”

Mr. Justice Jackson, in his dissenting opinion in the *Hope* case, *supra*, said:

“Solutions of these cases must consider eccentricities of the industry which gives rise to them and also to the Act of Congress by which they are governed.

The heart of this problem is the elusive, exhaustible, and irreplaceable nature of the natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust

or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own."

Further, in the same case, Mr. Justice Jackson said:

"Utilization of natural gas of highest social as well as economic return is domestic use for cooking and water heating, followed closely by use for space heating in homes. . ."

\* \* \* \* \*

"Industrial use is induced less by these qualities than by low cost in competition with other fuels. . ."

Further, in the same case, Mr. Justice Jackson said:

"The Commission's concept of the public interest in natural gas cases which is carried today into the Courts' opinion was first announced in the opinion of the minority in the Pipeline case. It enumerated only two 'phases of the public interest: (1) the investor interest; (2) the consumer interest,' which it emphasized to the exclusion of all others. 315 U.S. 575, 606, 62 S. Ct. 736, 753, 86 L. Ed. 1037. This will do well enough in dealing with railroads or utilities supplying manufactured gas, electric power, a communications service or trans-

portation, where utilization of facilities does not impair their future usefulness. *Limitation of supply, however, brings into a natural gas case another phase of the public interest that to my mind overrides both the owner and the consumer of that interest.* Both producers and industrial consumers have served their immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. *But it also requires stopping unjust impoverishment of future generations. The public interest in the use by Hope's half million domestic consumers is quite a different one from the public interest in use by a baker's dozen of industries."* (emphasis added.)

Prior to the decision in the case of Federal Power Commission vs. Hope Natural Gas Company, *supra*, the Commission took the position that it had no authority to consider the use to which natural gas would be used at its destination in determining whether or not certificates of convenience and necessity should issue. In its opinion in the matter of the Tennessee Gas & Transmission Company, 3 F.P.C. 574, the Commission stated:

"Intervenors representing coal operators, labor unions and railroads, having a vital stake in the coal industry in the Ap-

palachian area, oppose the granting of a certificate for the construction of Applicant's proposed natural-gas pipeline principally on the ground that the present and future fuel needs of that area can be adequately met by coal. It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

"We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. It appears, therefore, that the Natural Gas Act does not vest this Commission with complete and comprehensive authority which would permit us to act as arbiter over the end uses of natural gas."

The opinion in the Tennessee case was rendered on September 24, 1943 by the Commission. On January 3, 1944 this Court handed down its decision in



the Hope Natural Gas Company case, *supra*. Following the Hope decision by this Court, the Federal Power Commission changed its position as expressed in the Tennessee opinion rendered by the Commission, and in Opinion No. 114 issued by the Commission on April 26, 1944 in another case involving the Hope Natural Gas Company (Dockets Nos. G-507, G-508, G-510, G-516, and G-519), the Federal Power Commission said:

"That considerations of conservation are material to the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act is not open to question. We are deeply cognizant of the necessity for conservation of the country's irreplaceable natural-gas resources. Full opportunity was given to the interveners and applicants to present evidence respecting this aspect of the proposed projects. Voluminous evidence was received concerning the end-uses to be made of the natural gas in the area, which is a long-established natural-gas market.

"The evidence shows that the consumers proposed to be served by the projects are primarily those who are now using natural gas or whose service has been recently interrupted due to the gas shortage in the area. The testimony discloses that most of such natural-gas consumption is for residential and high-grade commercial use.

While sales are proposed to be continued to industrial customers now being served or whose service was recently interrupted, such sales are in large part for specialized or superior uses. The quantity of natural gas now being used for boiler fuel for ordinary industrial purposes in the area to be served is negligible. Quoting 'Federal Power Commission v. Hope Natural Gas Co.,' 320 U.S. 591, 88 L. Ed. 276, 288 (Decided January 3, 1944.)"

In its order of June 10, 1944, in the matter of the Memphis Natural Gas Company in Docket No. G-522 (the original order in this case, Vol. 1, 62), the Federal Power Commission said:

"In view of the limited natural gas reserves shown by the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses.

"The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future public convenience and necessity." (Vol. 1, 62)

The salient findings in the order of June 10, 1944, (original order in case at bar, Vol. 1, 55-62), were to the effect that the Monroe Field contained the equivalent of approximately eight years' supply of natural gas at the rate of production which prevailed in January 1944 and that the gas was being withdrawn from the field at too rapid a rate (Vol. 1, 57); that there was available to the applicant in the North Lisbon field the equivalent of approximately nine years' supply based upon withdrawals of forty million cubic feet per day. (Vol. 1, 58)

The Commission found that in 1943, 44.3 per cent of the total sales of natural gas, by the Applicant, represented gas used by industry for steam generation; that 6.9 per cent of the gas sold to industry by the Applicant was for "steam generation in combination with other industrial uses" or a total of 51.2 per cent for such combination of purposes. Similar estimated sales for 1944 amounted to 53 per cent of the total sales. (Vol. 1, 59)

Based on these findings, the Commission refused to issue the certificate to Applicant to build the lines from Guthrie, Louisiana to Memphis, Tennessee, and in refusing the permit said, "In view of the limited natural gas reserves—it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses." (Vol. 1, 62)

On rehearing, the Commission granted the certificates of public convenience and necessity without Applicant showing additional reserves available under firm contracts. (Vol. 1, 234-A, 244-A-246-A). Applicant produced only letter agreements that were tentative in nature, and required negotiations with third parties before completion, and the record does not show the contracts were completed. (Vol. 1, 234-A, 244-A-246-A). Further, the record on rehearing shows ample gas for domestic and commercial use with present existing facilities. (Vol. 1, 290-A). Applicant's own witness testified maximum peak demand in 1943 in Memphis for natural gas was 40,476 MCF for residential purposes, and 21,450.6 MCF for commercial and commercial heating in Memphis, producing approximate total of 62,000 MCF for these purposes on peak day in 1943 in Memphis. (Vol. 1, 290-A)

The capacity of present system, before facilities applied for in this proceeding, is far in excess of amount necessary to take care of residential, commercial, and commercial heating demand in Memphis on peak day.

The Applicant, in the record, showed more natural gas could be consumed at Memphis by converting present coal burning boilers to natural gas, and prospective new industries that may come to Memphis could burn natural gas under boilers.

The record conclusively shows use of natural gas as boiler fuel constitutes an inferior use of natural gas. The Federal Power Commission in effect held that to be the fact in its decision and order of June 10, 1944, in the case at bar. As early as 1940 it expressed the view that "general use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy. (Twentieth Annual Report of Federal Power Commission, page 79). The President of the Memphis Natural Gas Company, Applicant herein, in appraising preferential uses of natural gas, placed domestic use at the top of the list and space heating or generation of steam under boilers at the bottom. (Vol. 1, 54-A—59-A) Also see testimony to the effect that burning natural gas under boilers constitutes an inferior use appearing in record, Vol. 1, 79-A—89A.

The Federal Power Commission, in its brief filed in the United States Circuit Court of Appeals, Fifth Circuit, in support of its Opinion 119, and Order issued in connection therewith on November 21, 1944, in the case at bar, which reversed its original order issued June 10, 1944, refusing the certificate to build the line from Guthrie, Louisiana, to Memphis, Tennessee, at page 17, stated:

"With respect to the purposes for which natural gas is used by ultimate consumers, the Act does not vest the Commission "with

complete and comprehensive authority which would permit it to act as arbiter over the end uses of natural gas."

To substantiate the above position, the Commission cited the opinion it rendered on September 24, 1943, in the case of Tennessee Gas & Transmission Co., 3 F. P. C. 574, 479. By taking this position, the Commission reverted to the position it took prior to the decision of this Court in the case of Federal Power Commission v. Hope Natural Gas Company, *supra*.

The inconsistent positions taken by the Commission in certificate cases under Section 7 of the Act, as shown hereinabove, conclusively show the Commission is uncertain as to its authority under the certificate section of the Act. It is tremendously important that it be decided by this Court what factors are determinative in the issuance of certificates of public convenience and necessity under Section 7 of the Act.

## 6.

In determining the meaning of the phrase, "public convenience necessity", as used in the Natural Gas Act, both the Commission and the lower Court have failed to construe this phrase in the light of the declaration of Congress in Section 1 of the Act, which states the reason for adopting the Natural Gas Act.

The Court, in its opinion, (Vol. III, 9), specifically held that there is no criterion in the Natural Gas Act

to support the position of the petitioners. Petitioners urged in the proceedings before the Commission and before the Court that the phrase, "public convenience and necessity", as used in Section 7 of the Act, must be construed in connection with the entire Natural Gas Act, especially Section 1, which refers to the report of the Federal Trade Commission, quoted in part, in this petition and brief in Paragraph 9 of "Questions Presented".

The very purpose Congress had in mind in adopting the Natural Gas Act was to prevent the very thing the Federal Power Commission is attempting to do in the present proceedings. The Federal Trade Commission's report, referred to in Section 1 of the Act, stated that anyone familiar with the economic importance of natural gas as truly a national resource and the shocking and irreparable waste that has attended its exploitation in private hands, can hardly condemn an anxious national concern as to the conditions that exist, or deny the national importance of their correction. (Questions Presented, No. 9). The report of the Federal Trade Commission referred to in Section 1 of the Act, stated that vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses. (Questions Presented, No. 9).

The report of the Federal Trade Commission stated that natural gas, being a valuable irreplaceable

natural resource of general countrywide use or need, should, in the public interest, be conserved and utilized to the highest economic and social advantage, (Questions Presented, No. 9). The Federal Trade Commission also said that it was a matter of public concern that natural gas be produced only as needed and then it should be used to the highest economic and social advantage, and that there are no precise parallels in the utility fields for such a situation.

Congress, in adopting the Natural Gas Act, sought to remedy the evils referred to in the Federal Trade Commission's report, part of which is referred to in the next preceding paragraphs. We submit that the language, "public convenience and necessity", coupled with the declaration of Congress referring to in the Federal Trade Commission report, constitute a plain and unquestionable criterion that the Federal Power Commission is required to follow in certificate cases, and that the Commission and the lower court erred in holding that there is no criterion to support the position of petitioners in this cause.

This Court, in the case of *United States vs. American Trucking Associations*, 310 U. S. 534, 541, 60 Sup. Ct. 1059, said:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect



to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation."

In the case of *Morehead vs. People of State of New York*, 298 U. S. 587, 615, 56 Sup. Ct. 918, 925, this Court, in discussing the rule concerning the construction of statutes, said:

"... The 'factual background' must be read in the light of the circumstances attending its enactment. . . ."

In the case of *Atlantic Cleaners and Dyers vs. United States*, 286 U. S. 427, 435, this Court, in construing an Act of Congress, said:

"A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Anti-Trust Act and of the mischief to be remedied, as well as the general trend of debate in both Houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. . ."

From the above authorities, it is evident that an act of Congress must be construed in the light of the evils the act seeks to remedy. By adopting the Natural Gas Act, especially Section 7 thereof, requiring certificates of public convenience and necessity, coupled with the declaration in Section 1, referred to hereinabove, there is no question but what Congress fully intended to remedy the evils pointed out in the Federal Trade Commission report, and the Commission and the lower Court erred in not construing the Act accordingly.

## 7.

The record in the case at bar does not contain substantial evidence to support the ultimate conclusion reached by the Federal Power Commission that public convenience and necessity requires the issuance of the certificates in the present proceeding.

## 8.

The tremendous importance of the final decision in this case, and its effect upon the general public welfare is evidenced by the character of the parties intervening in the proceeding. The State of Tennessee, The Light, Gas and Water Division of the City of Memphis, Tennessee, The West Tennessee Gas Company of Jackson, Tennessee, the Railroad Commission of the State of Texas, The Oil and Gas Board of the State of Mississippi, The Corporation Commis-

sion of the State of Kansas, The Department of Public Utilities of the State of Arkansas, The Independent Natural Gas Association of America, The Public Service Commission of the State of Louisiana, The Department of Conservation of the State of Louisiana, The National Coal Association, The United Mine Workers of America, The Order of Railway Conductors, The Brotherhood of Locomotive Engineers, The Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, intervened in this proceeding. (Vol. II, Pgs. 3 and 4 of the Brief filed by the Federal Power Commission.)

### **JOINT RESOLUTION**

#### **ADOPTED BY LEGISLATURE OF LOUISIANA**

Appearing in Appendix B of this petition and brief is a copy of joint resolution adopted by the Legislature of Louisiana on June 2, 1942, which authorizes and directs the petitioners herein to represent the State of Louisiana in these and other proceedings before the Federal Power Commission. This resolution details the reasons for the position taken by petitioners in this litigation.

**JUDGMENT OF UNITED STATES CIRCUIT  
COURT OF APPEALS STAYED PENDING  
DISPOSITION OF PETITION  
FOR CERTORARI**

On May 21, 1945, the United States Circuit Court of Appeals entered an order in this case staying the operation and execution of the judgment rendered by that Court on March 31, 1945, and the opinion and order rendered by the Federal Power Commission in this case, pending disposition of this petition for certiorari.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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